

IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 16 of 2016

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

HOUSSEIN NAOUROUJT NASAB
Defendant

*Mr. Sevualoni Valenitabua Public Legal Defender for the
defendant*

*Mr. Filimoi Lacanivalu office of the Public Prosecutions for the
defendant*

Date of Hearing: 12th May 2016

Date of Ruling: 13th June 2016

Ruling

INTRODUCTION

1. The defendant is charged with one count of Threats to kill contrary to section 359(1) (b) of the Criminal Code 1899. The maximum penalty for this offence is 10 years imprisonment. Section 359(1)(b) of the Criminal Code 1899 reads:

"Any person who threatens to kill or to do any injury, or cause any detriment, of any kind to another with intent to prevent or hinder that other person from doing any act which the other person is lawfully entitled to do, or with intent to compel the other person to do any act which the other person is lawfully entitled to abstain from doing, or with intent to cause public alarm or anxiety, commits a crime.

(a)...

(b) 10 years imprisonment if the threat includes a threat to kill."¹

The particulars of the offence charged are that:

*"Houssein Nourouzi on the 28th April 2016 at the Connect Services Beach House in Nauru, threatened to kill himself, his wife namely Tahereh Jaffari Nia and his son namely Havin Nourouzi Nasab by setting themselves on fire, with intent to cause public alarm"*²

CONCERN ABOUT THE MANNER IN WHICH THE AFFIDAVIT BY THE PROSECUTION IS BEING DRAFTED

2. I have noted with concern the use of the word "THAT" in bold and underlined in the affidavits filed by the prosecution to introduce each new paragraph of the affidavits. This has not only happened in the affidavits filed in this case but it has been done in several other cases. Firstly it is bad English and grammar. I do not know why this is being done but it is my view that this is not proper and it should be stopped.
3. On the 20th May 2016, I reserved my ruling on the remand application and made the following directions:-
 - i) Prosecution to ascertain whether or not Ms. Brenda Clare had made a statement to the police and is a witness intended to be called by the prosecution to give evidence against the defendant.
 - ii) Whether or not the issue of "privileged information" applies to allow the defendant to plead that any information divulged to Ms. Clare, Ms. Angove and Ms. Blair in their capacity as case managers and social welfare officers are privileged information on the basis of client/patient relationship.
 - iii) Affidavits to be filed by prosecution confirming whether or not Ms. Brenda Clare has made a statement to the police and whether Ms. Brenda Clare is a witness intended to be called by the prosecution to prove his case against the defendant submitted by Wednesday 25th May 2016.

¹ Section 359(1)(b) of the Criminal Code 1899

² Particulars of the offence as charged and filed with the District Court on the 12 May 2016

- iv) Submissions on the issue of whether or not any information given by the defendant to Ms. Brenda Clare, Ms. Amy Blair and Karen Angove during the course of attending to the defendant as his case manager or as social welfare officer is privileged information be submitted by Friday 26 May 2016.

PROSECUTION RESPONSE

4. As correctly pointed out by Mr. Valenitabua instead of obtaining from Ms. Claire information concerning whether or not she has made a statement to the police, the prosecution went ahead and obtained another statement from Senior Constable Chiesty Duburiya stating at paragraph 9 that "on 16 of May 2016, a Ms. Brenda Claire had given a statement written with the assistance of her Manager but later refused to sign that statement"³. Why the prosecution did not obtain an affidavit from Ms. Brenda Clare to confirm whether or not she had made a statement and if she had made a statement why did she refuse to sign the statement is as good as anyone's guess. The court has been deprived of this information because of the failure by the prosecution to obtain confirmation and explanation from Ms. Brenda Clair on this issue. The duty to do so lies on the prosecution.
5. To now turn around and say in its submission that "**the prosecution is not relying on Ms. Clare's statement for the purposes of this application given her position in paragraph (11) above but whether or not she is a prosecution witness in trial is an issue that require careful consideration and will be determined prior to trial since prosecution has the right to call anyone as a witness in trial for this matter**" emphasis mine. Of course it is for the prosecution to choose whether or not to call Ms. Clare at trial. But why did she make a statement and then refused to sign? Does this court not need an explanation coming from the prosecution to enable this court to strike a balance in the exercise of its discretion on whether or not to grant bail to the defendant?
6. I find this aspect of the prosecution submission, so strange and ignorant of its prosecutorial duty to assist the court. With its right to call any witnesses at trial it has a corresponding duty even at the stage of a remand

³ Paragraph 9 affidavit of Constable Chiesty Duburiya

hearing to assist the court with all relevant information. It is my view that the standard of duty to the court and threshold of that duty owed to the court by the prosecution at the remand hearing is the same as that trial. The only difference is that at trial the standard to prove one's guilt is that of beyond reasonable doubt and at bail the standard is one of on the balance of probabilities to convince the court to refuse bail.

REFILING OF AFFIDAVIT BY DEFENDANT

7. On the 9th of June 2016, Mr. Valenitabua refiled the affidavit of the defendant. This affidavit was refiled to comply with Order 34 rule 9 of the Civil Procedure Rules 1972. Mr. Lacanivalu has objected to the court accepting the refiled affidavit that has now complied with rule 9 of Order 34 of the Civil Procedure Rules arguing that an application should have been made under Order 34 rule (5) for the court to accept the affidavit originally filed despite its defect and non-compliance with Order 34 rule 9 of the Civil Procedure Rules 1972.
8. Following the court's ruling in Republic v Fadhell Abbas Al Manhal District Court Criminal Case No. 12 of 2016, Mr. Valenitabua has filed another affidavit complying with the requirements to rectify the defect. He need not apply for leave to file the affidavit and he need not apply for leave from the court to rely on the defective affidavit because there has now been compliance with order 34 rules 9 of the Civil Procedure Rules. Mr. Lacanivalu has submitted that the court must protect its own procedures by rejecting the affidavit filed by Mr. Valenitabua. I reject that submission by Mr. Lacanivalu. The court must and is duty bound to accept affidavits properly filed. I do so in this case with regard to the affidavit filed by Mr. Valenitabua on the 9th June 2016 on behalf of the defendant.

ASSESSMENT OF THE PROSECUTION CASE FOR THE DEFENDANT TO BE FURTHER REMANDED

9. It is my view that a clear reading of section 359(1) (b) of the Crimes Act 2016, the defendant cannot be charged with threatening to kill himself as was done in this case. The offence of attempted suicide is no longer an offence in this jurisdiction. And the defendant in my view is not a person capable of being a victim of his own actions under a

charge under section 359(1) (b) of the Crimes Act 2016. His child and wife as contained in the particulars of the offence yes; but not the defendant.

10. I have invited submissions on whether or not the statements given to the police by the case managers employed by Connect Settlements Services is privileged information and therefore cannot be used against the defendant even at this stage of the bail hearing.
11. From the affidavit of Constable Chiesty Duburiya, and the attachments therein in, it is reasonable to conclude that the police source for information giving rise to the charges against the defendant is based on the matters deposed to in the statements given to the police by Ms. Karen Angove and Ms. Amy Blair case managers with Connect Settlement Services.
12. There is insufficient information before the court to determine the issue of whether or not the statements alleged to have been made by the defendant to Ms. Blair and Ms. Angove are privileged. What is the duty of a case manager employed by Connect Settlement Services? What does it involve? What is the relationship between the case manager employed by Connect Settlement Services and each individual refugee or asylum seeker under the supervision of the case manager? It is the duty of the prosecution to provide this information to the court. There is no such information before the court.
13. Because of the short fall in the information as alluded to in paragraph 12 of this ruling, I am unable to determine the issue of whether or not the information alleged to have been given to Ms. Angove and Ms. Blair are privileged. As a consequence I am unable to determine the strength of the prosecution case.
14. The charge against the defendant in terms of one of the persons that he is alleged to have threatened to kill is his two months old child. This is serious not only because of the age of the child but because the seriousness of the offence charged is reflected in the maximum penalty provided by law. This child's voice must be heard above all the perceived failures by the prosecution to provide the court with the necessary information and be heard from a child protection point of view.

15. The child's interest from a child protection perspective must in my view result in his liberty being curtailed. Bail is refused.
16. Defendant is remanded in custody to 22nd June 2016.
17. Full disclosures to be provided to the defence by the prosecution within the next seven days.
18. Matter is adjourned to 22nd June 2016 for a possible plea

Dated this 13th day of June 2016



Emma Garo
Resident Magistrate

